

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original + affidavit of Mailing

77-1294

To be argued by
MARK A. SUMMERS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1294

UNITED STATES OF AMERICA,

—against—

STEVEN HYATT,

BPL
Appellee,

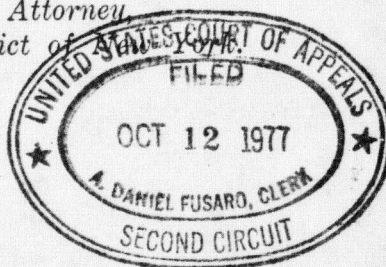
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
MARK A. SUMMERS,
Assistant United States Attorneys,
(Of Counsel).



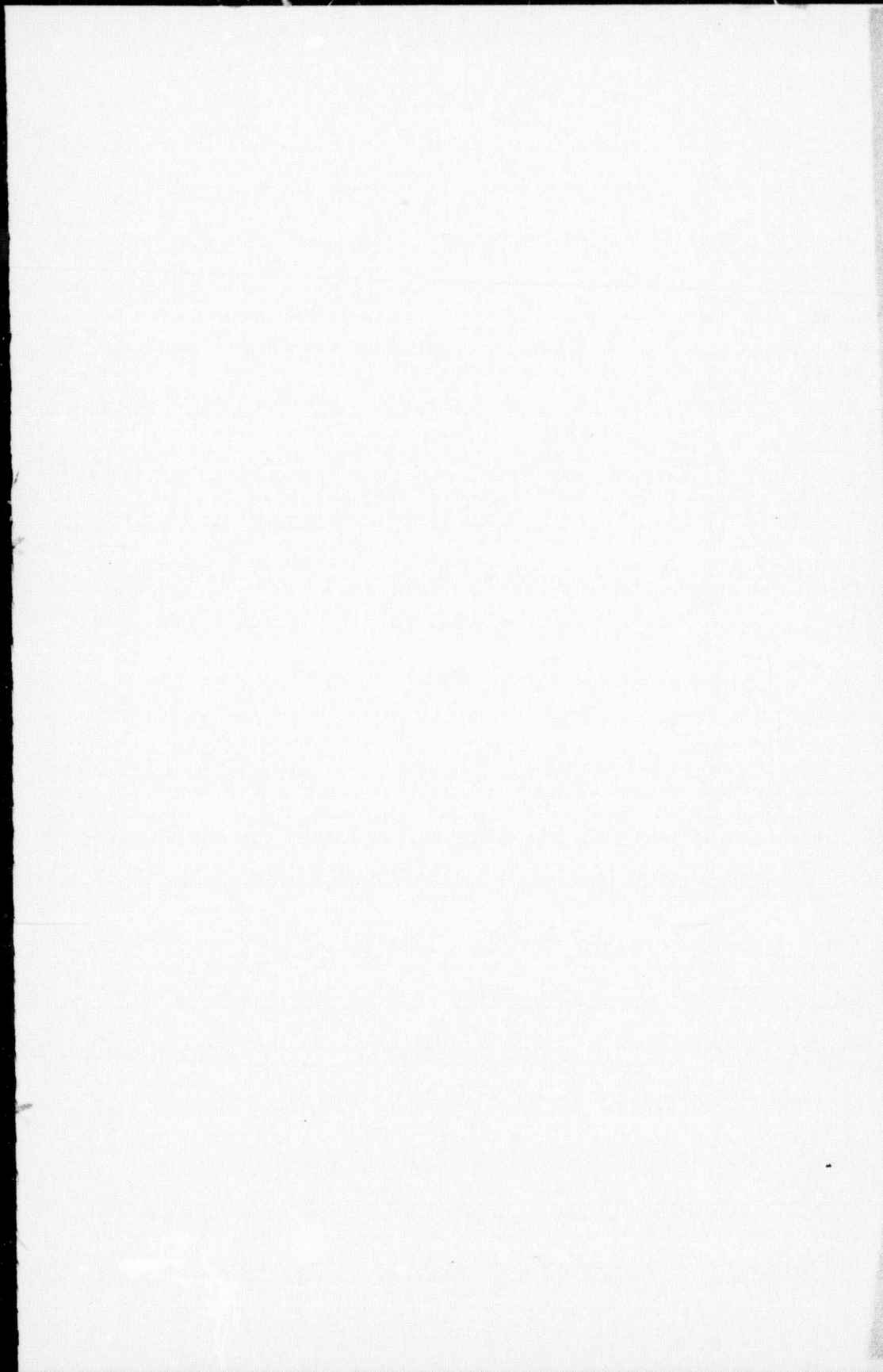


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Docket No. 77-1294

UNITED STATES OF AMERICA,

Appellee,

—against—

STEVEN HYATT,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Steven Hyatt appeals from a judgment of the United States District Court for the Eastern District of New York, (Neaher, J.) entered on July 1, 1977, convicting him, after a jury trial, of: 1) knowingly publishing and uttering as true certain forged United States Treasury checks (Counts 1-5), in violation of Title 18, United States Code, Sections 495 and 2; and 2) knowingly possessing United States Treasury checks which had been stolen from the mails (Counts 6-15), in violation of Title 18, United States Code, Sections 1708 and 2. Appellant was sentenced to concurrent terms of eighteen months imprisonment on each of the fifteen counts of the indictment. Appellant is presently free on bail pending this appeal.

Appellant contends here that the trial court's rulings precluded a fair opportunity to prepare and present an effective entrapment defense; that the evidence was insufficient to show that appellant "uttered" forged treasury checks; and that the prosecutor's examination of witnesses was so prejudicial as to require reversal.

Statement of Facts

1. The evidence showed that on December 16, 1976, Inspector Sydney Wilson of the United States Postal Inspection Service received a telephone call from an informant indicating that an individual known as "Steve" wanted to sell some United States Treasury checks (151).¹ Wilson then made arrangements for other investigators of the Postal Inspection Service and Special Agents of the Secret Service to act as surveillance agents for the proposed "check buy", which was to take place that day at a MacDonald's Restaurant located in Queens, New York (153).

After the surveillance agents had driven to the MacDonald's parking lot, Inspector Wilson arrived in a separate automobile, saw the informant standing next to appellant (Steven Hyatt), and parked his car nearby (154). The informant entered the front seat of the car while appellant got in the back seat (154-155). As previously instructed by Wilson, the informant introduced Wilson to appellant as "Big Ed", who was known to be a "check fence" (155, 160). Appellant discussed the stolen checks with Wilson, explained that he would have to leave the car to get the checks, and then left (155). After a brief interval, appellant returned, producing an

¹ Unless otherwise noted, all references are to the trial transcript.

envelope containing ten United States Treasury checks made out to various payees (155-156).² Five of these checks (the basis both of "possession" counts and the "uttering" counts) had forged endorsements, while the other five (the basis solely of "possession" counts) were unendorsed.

Upon receiving the checks, Wilson asked appellant the total amount of their face value. Appellant indicated that he had computed the value on the envelope in which the checks were contained (157-158). Wilson asked appellant what he was asking for the checks, and appellant asked what Wilson was offering. Wilson replied that because the checks were fifteen days old, the most he could offer was twenty-five percent of their face value (157). Appellant asked Wilson what that amounted to in "dollars and cents" and Wilson, after computing the amount, told appellant (157). Appellant answered "good" (157).

Wilson then left the car, telling appellant that the money was in the trunk (157-158). When Wilson raised the trunk lid—the prearranged signal to the other government agents that the transaction had been completed—the agents moved in and arrested appellant.³ Appellant's co-

² The evidence regarding where appellant went to get the checks was conflicting. Appellant's co-defendant, Linda Andre, who was severed because of illness during the course of the trial, executed a written statement in which she said that she had carried the checks to MacDonald's in her pocketbook and appellant had gotten them from her when the deal was imminent (185-186). Appellant's statement, taken after his arrest, was that he had called "Bunny", his source for the checks on December 16 and that, as instructed by appellant, "Bunny" had placed the checks in an agreed-upon hiding place at MacDonald's (190-191). Appellant testified at trial that he had the checks when he entered Wilson's car and never left the car prior to the transfer (353-356).

³ The agents simultaneously feigned arrests of Wilson and the informant, who were both released after a brief detention (158-159a).

defendant Linda Andre, who was in the vicinity, was also taken into custody but was not placed under arrest.

While in custody appellant and his co-defendant falsely stated their names and produced false identification papers (140-141, 178, 276-278). When confronted with the fact that Andre had inadvertently revealed appellant's real name, appellant acknowledged that he was Steven Hyatt (181-182, 187-188). Appellant then executed a written statement in which he admitted that he had received the checks from a man named "Bunny", who had originally wanted him to deposit them in appellant's own bank account (189-192).⁴ Additionally, appellant admitted in his trial testimony that he had seen several hundred stolen Treasury checks at "Bunny's" apartment (310) and that he knew that a large number of these checks had forged endorsements (360).

2. Appellant's participation in the December 16 transfer of stolen checks to Agent Wilson was not really disputed, and indeed appellant's counsel admitted appellant's role in that transaction during the defense's summation (500-501).⁵ Rather, appellant's only defense was his claim of entrapment. The primary basis for appellant's entrapment defense was his own testimony, which was essentially uncontradicted. According to appellant, he met "Jimmy", the informant here, at a friend's house in November 1976 (306, 369). Jimmy asked appel-

⁴ Appellant's versions as to when he received the checks and what he did with them were somewhat contradictory. As indicated above (n.2, *supra*), appellant averred in a pretrial statement that on December 16th "Bunny" placed the checks in a "hiding place" at MacDonald's (190-191). However, later in the same statement, appellant said that he "had previously been given these checks to deposit in [his] account the week before" (191). Similarly, appellant testified at trial that he had received the checks several days before December 16th and had retained them until the transfer to Wilson (308-311, 370-372).

lant if he "did checks" or if he "could get checks"; appellant replied that he was not interested (306, 369-370). Jimmy subsequently met appellant in Queens and told appellant that he was reserving "something big" for appellant with someone in Brooklyn (307-308). On a number of occasions Jimmy attempted to reach appellant by telephoning the house of one Laura Tomkins (co-defendant Andre's mother), where appellant had lived prior to November 1976 (307, 383). When Jimmy finally spoke with appellant, he asked appellant to supply checks which could be sold for profit (306-307). Appellant answered that he had not contacted anyone about checks and told Jimmy not to call Laura Tomkins' house because appellant no longer lived there (307).

Appellant testified further that in December 1976 he saw Jimmy a second time. Jimmy suggested that appellant take advantage of Jimmy's connections, but appellant said he did not want to get involved (307-308). Thereafter, appellant had a conversation with "Bunny", whom appellant had known for several years (308-310, 349-351). Bunny offered to appellant the treasury checks involved in the indictment here (308-310). Appellant took the checks to give them to Jimmy "because Jimmy had been bugging me about checks, that is the reason I took the checks in fact to give them to Jimmy to stop him from calling Linda's mother's house" (310, 368, 374, 381-382). Jimmy later called appellant and told him he had arranged a transaction for December 13, 1976 (311). Appellant said he was "dead against" the deal (311). Jimmy expressed annoyance at appellant's refusal, and said that a sale could be arranged for December 16, 1976, and that appellant need only "be there" since Jimmy "would do all the business" (312-315). Appellant consented, and the transfer to Agent Wilson was arranged. Appellant admitted in his pretrial statement (p. 4, *supra*)

that he had understood his profits in the December 16 transaction would be between \$400 and \$600 (189-192).

In light of this evidence, the district court instructed the jury on entrapment, but the jury, by its verdict, rejected appellant's entrapment defense.

ARGUMENT

POINT I

Appellant Had A Fair Opportunity To Prepare And Present His Entrapment Defense.

Appellant contends that as the result of various rulings of the district court and the actions of the prosecutor, he was precluded from properly preparing and presenting his entrapment defense. Contrary to appellant's contentions, the record reveals that from the day of his arrest until the end of the trial, appellant had the requisite knowledge, opportunity and ability to prepare and present his case.

A. Appellant Was Not Deprived Of A Fair Trial By The District Court's Refusal To Compel Pre-trial Disclosure Of The Informant's Identity.

Appellant contends (Br. 15-19) that the district court committed reversible error in its refusal, prior to trial, to require the government to reveal the identity of its informant. As we show below, there is no merit to this contention.

1. Appellant moved, prior to trial, for an order directing the government to provide information relating to the identity and whereabouts of its informant (see Appellant's "Appendix D."). The government refused to

provide that information (*id.*). At a pre-trial hearing on the motion, appellant's counsel argued that identification of the informant was essential to the defense because of prior dealings between the informant and appellant that had a bearing on appellant's entrapment defense (April 21, 1977, pp. 16-18, 20-21).⁵ The government argued that under the particular circumstances of this case the "informant's privilege" was applicable (April 21, 1977, pp. 14-16, 18-24). The district court determined that, based upon the arguments presented, revealing the informant's identity was not essential to the defense. The court found that it appeared that the informant was present at the sale only to introduce the two parties to the transaction and that such a situation did not seem to require at that time that the informant's identity be revealed prior to trial (April 21, 1977, p. 28-29).

After appellant's direct testimony was concluded, the district court commented that, in light of that testimony, the informant "might well have had a deliberate role here" and that the court might possibly have erred in not requiring the government to disclose the informant's full name (342).⁶ While the district court never reversed its prior ruling on disclosure or ordered the government to reveal the informant's identity (see 344-345), the prosecutor at this point voluntarily offered to make that revelation and to secure the informant's presence the following morning so that he could be subpoenaed as a defense witness (344). The next morning, the informant was made available to be interviewed by appellant's counsel. The district court indicated at that time that the interview was to be held outside of the prosecutor's pres-

⁵ Numerals in parenthesis preceded by a date refer to pages of the transcript of pretrial proceedings occurring on that date.

⁶ As discussed *infra* (pp. 11-12), appellant's testimony on cross-examination subsequently revealed appellant's own knowledge of the informant's true identity.

ence, but emphasized that the informant could stop the interview and seek out the prosecutor if the informant wanted to ask him any questions (400-401). At 10:45 a.m., a recess was taken to allow the interview to be conducted. At 11:15 a.m., when the trial resumed, the prosecutor stated to the district court (403):

Your Honor, during the course of the questioning I had occasion to walk in and check with the witness to determine if everything was all right. I was informed by the witnesses that attempts were made to elicit from him his address and his arrest record and some other matters. . . .

The prosecutor then explained that he had decided to terminate the interview since such questions seemed to be violative of the court's prior rulings on disclosure and since, therefore, it seemed appropriate for the Court to rule on the propriety of defense counsel's conduct of the interview (404-405). The district court then stated its agreement with the prosecutor's view that the interview need not have disclosed those matters (406). The court further observed that its "primary purpose" in allowing the interview was "to enable [defense counsel] to make up [his] mind whether or not [the informant] would be a witness or could be a witness for the defense on this sole issue of entrapment" (406).

Although defense counsel admitted that during the interview he had discussed with the informant a number of subjects—including "the facts of the case, when he met [appellant], what his relationship was with Agent Wilson, . . . the events at the time [the informant] said he first met [appellant]" (405)—defense counsel told the district court that he did not intend to call the informant as a witness "because [he hadn't] had the opportunity to speak with him" (406-407). The court ruled (407):

Then there is no point in continuing the interview . . . that was the whole purpose, nothing more than that, to give you a chance to review the situa-

tion with him and make your own judgment as to whether or not anything he said would enable you to use him as a witness for the defense.

Now, if you have reached that conclusion, then I see no point in wasting any more time on the matter.

Defense counsel neither requested more time to interview the informant, nor took exceptions to the court's ruling.

2. Appellant can show no reversible error in the trial court's refusal to compel pretrial disclosure of the informant's identity and whereabouts. In the first place, the court properly exercised its discretion in ruling against such pretrial disclosure. The government's privilege in maintaining the confidentiality of its informants is well established. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The Supreme Court in *Roviaro* stated (353 U.S. at 62):

We believe no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

In this case it is clear that the district court considered the factors outlined in *Roviaro* and properly decided against disclosure since the informant's testimony did not appear to be essential to appellant's case. With respect to appellant's role in the transaction itself, the court found it highly unlikely that the informant would provide exculpatory evidence for the defense (April 21, 1977,

p. 28). This was made clear by the district court when it held that "the informant would not be here to prove the defense case because . . . he is certainly not going to say that [appellant] was innocent and that he was guilty" (*id.*). Thus, the district court followed the principle enunciated by this Court in *United States v. Edmonds*, 535 F.2d 714, 719 (2d Cir. 1976) ("the request for disclosure had no real possibility of affording a defense that could create a reasonable doubt in the mind of a reasonable juror").

As to the alleged entrapment defense, the court considered that entrapment is an affirmative defense which places the burden of going forward on the defendant (April 21, 1977, p. 28). The court also indicated in this regard that appellant's own testimony was the primary means by which he would be able to establish that defense. If the informant's testimony substantiated appellant's, then the informant's testimony would be merely cumulative. (April 21, 1977, p. 26). See *United States v. Super*, 492 F.2d 319, 323 (2d Cir. 1974), *cert. denied*, 419 U.S. 876 (1974) and *United States v. D'Angiolillo*, 340 F.2d 453, 456 (2d Cir. 1965), *cert. denied*, 380 U.S. 955 (1965) (both holding testimony of witness-informant to circumstances of crime would be relevant but cumulative and, therefore, there was no error with respect to his failure to testify at trial). If the informant's testimony contradicted appellant's, then it could hardly be considered essential to appellant's case.⁷

This case bears a striking similarity to *United States v. Alexander*, 495 F.2d 552 (2d Cir. 1974), where this Court rejected the claim that assertion of an entrapment

⁷ And, as the district court indicated (April 21, 1977, p. 26), if the government decided to have the informant testify in order to overcome appellant's defense, the informant would have been available for cross-examination and appellant would have been entitled to materials relating to witnesses under 18 U.S.C. § 3500. Moreover, the government could not call the informant to the stand without abandoning its claim of privilege.

defense required disclosure of an informant's identity. There, as here, defendant's own testimony clearly revealed his guilt. Reviewing the trial court's failure to order disclosure, this Court stated (*id.* at 553):

Even had [the informant] been available and fully supported [the defendant's] account of the day's events, the defendant's own damning admissions demonstrated his independent willingness to facilitate a drug sale. This evidence of a predisposition to commit the crime charged was sufficient to demolish [the defendant's] contention that he was entrapped.

By the same token, appellant's entrapment defense here is undermined by his own damning testimony, in which he admitted (*inter alia*) his profit motive and his connections with suppliers of stolen checks but claimed that an informant had beseeched him on a number of occasions to commit the offense.

In short, it cannot be said that the district court abused its discretion in denying appellant's motion for discovery, particularly since appellant had the opportunity to make a showing of overriding necessity during later stages of the proceedings.

Assuming *arguendo* some error in the district court's pretrial ruling against disclosure, the error was clearly not so prejudicial as to require a reversal. Appellant's pretrial motion asked only that the identity and whereabouts of the informant be disclosed (not that the informant be produced for trial). Appellant's brief (pp. 4 & 9) indicates that during the relevant periods the informant was known to him only as "Jimmy" and "diligent efforts" had failed to reveal his true identity.⁸ The record indi-

⁸ This latter assertion is supported only by defense counsel's bald assertion during the pretrial hearing that an investigator had failed to discover the informant's identity (April 21, 1977, p. 25).

cates, however, that appellant was fully aware of the informant's identity and whereabouts both prior to and throughout the course of the trial. Appellant's own testimony at the trial shows that he knew the informant's name was Jimmy Mitchell (354, 367); that he knew that Jimmy Mitchell owned a "T. V." shop on Hollis Avenue in Queens (368); that he had met Jimmy Mitchell at Cheryl Newkirk's house at 114-15 207th Street, Queens Village (369); and that he had in his possession at the time of his arrest a telephone number where Jimmy Mitchell could be reached (314).

This testimony casts substantial doubt upon the entire basis of appellant's pre-trial motion for disclosure of the informant's identity and strongly indicates that appellant could have located the informant and interviewed him prior to trial.⁹ Thus, appellant has failed to meet the requirement in *Roviaro* that "the informant is, in a real sense, 'unknown' to the defendant." *United States v. Fuentes*, No. 77-1083, 1179, slip op. 5883, 5895 (2d Cir., September 14, 1977). It is well established, moreover, that where the defendant has the requisite knowledge to enable him to obtain and secure a witness' presence at trial, he cannot successfully rely in his appeal on the trial court's failure to compel the government to obtain the witness for him. *United States v. Prada*, 451 F.2d 1319 (2d Cir. 1971); *United States v. Roberts*, 388 F.2d 646 (2d Cir. 1968). See, similarly, *United States v. DiGiovanni*, 544 F.2d 642 (2d Cir. 1976); *United States v. Stewart*, 513 F.2d 957 (2d Cir. 1975).

⁹ Had appellant been unable to locate him, he could have argued that, based upon the extent of his knowledge of the informant's identity, the government's claim of privilege was vitiated. *Roviaro*, *supra*, 353 U.S. at 60. Furthermore, the government might then have been under some duty to assist appellant in locating the informant and securing his presence for trial. See *United States v. Turbide*, 558 F.2d 1053, 1060 (2d Cir. 1977). However, since the government had no indication prior to trial of the extent of appellant's knowledge, its claim of privilege was clearly justified.

Appellant's argument here also fails because he demonstrated on the record no "diligent attempt" to locate the informant, as required by this Court's holding in *United States v. Turbide*, *supra*, 558 F.2d at 1060. There, defense counsel stated that the informant's last name and present whereabouts were unknown. *Id.* at 1058. In spite of that and the testimony indicating that the informer was trying to avoid detection by the defendant, this Court stated (*id.* at 1060 n.6):

[The defendant] still failed to fulfill a precondition to obtaining the Government's aid in securing the informer's presence at trial. A defendant who knows the informer must show that he made a diligent attempt to locate him before relief will be ordered under *Roviaro*. . . . Turbide made no such showing. . . .¹⁰

Finally, as will be discussed below (pp. 14-15, *infra*), appellant was allowed to interview the informant during the trial and nevertheless declined to call him to the stand. In light of all these circumstances, he cannot reasonably suggest now that the district court's error, if any, in refusing pre-trial disclosure warrants a reversal here.

¹⁰ The holding in *Turbide* would seem to apply *a fortiori* to the facts here. While the defendant in *Turbide* knew where the informant worked at the time of the offense, the trial took place almost two years later. Here, by contrast, appellant's knowledge of the informant's "whereabouts" was apparently current at the time of trial. Moreover, unlike the situation in *Turbide*, little time had elapsed here between appellant's claimed first meeting with the informant in November 1976 and the trial which began at the end of April 1977. It is also significant that the statements made by Turbide's counsel indicate far greater difficulty in locating the informant than does the unsupported assertion of defense counsel here (see n. 8 *supra*). And there is no evidence in this case that the informant was trying to avoid the defendant. In fact, when the informant was finally produced, it took less than one day to do so and he agreed to be interviewed by defense counsel.

B. Appellant Was Not Deprived Of A Fair Trial By The Prosecutor's Interruption Of Defense Counsel's Private Interview With The Informant.

Appellant makes a related contention (Br. 19-23) that he was deprived of the ability adequately to prepare and present his defense because the prosecutor, contrary to the district court's instructions, prematurely interrupted defense counsel's private interview with the informant. Appellant claims that because the interview was interrupted, he was unable to make an informed determination as to whether the informant should be called to testify.

While it was arguably inappropriate for the prosecutor to interrupt the interview on his own volition, it should also be noted that defense counsel had obtruded into then-forbidden areas of questioning and that the prosecutor did not prohibit a continuation of the interview, but merely sought a ruling from the district as to the propriety of defense counsel's conduct of the interview (p. 8, *supra*). Significantly, appellant did not except to the district court's ruling that the interview, its purpose apparently fulfilled, should be terminated. Nor did he even request that he be given more time to interview the informant. Accordingly, appellant should not be allowed to benefit here from the prosecutor's interruption of the interview.

In any event appellant cannot show that the interruption of the interview significantly impaired his defense. The interview apparently went on for a substantial time, and defense counsel's report to the court as to the extent of the interview strongly suggests that he had obtained sufficient information to determine whether to call the informant as a witness (406-407).¹¹ See *supra*, pp 8-9.

¹¹ Also, as noted above it is probable that appellant could have independently located and interviewed the informant at any time prior to or during the trial.

It would therefore seem that appellant's decision not to call the informant reflected an assessment that his testimony would not be exculpatory in any way. Moreover, the heart of appellant's entrapment defense was his asserted lack of predisposition, an issue which related primarily to the manner in which the informant allegedly pressured appellant to commit the crime. This evidence was adduced in appellant's own uncontradicted testimony and the informant's testimony, at best, was merely cumulative.¹² See Rule 403, Fed. R. Evid.

C. Appellant Was Not Deprived Of A Fair Trial By The District Court's Refusal To Admit The Testimony Of A Defense Witness.

Appellant also argues that the district court's ruling preventing appellant from calling a witness who would have supported his defense was erroneous. When appellant's counsel indicated that he wished to call this witness, apparently Laura Tomkins (his co-defendant's mother), the Assistant United States Attorney requested a proffer of the witness' testimony. Appellant now characterizes this request as the "Government's totally unjustified demand" (Br. p. 13). However, when the government made the request at trial, the court asked appellant's counsel, "Is there any reason why we should not have some idea about what this witness may testify to?" (408-09). Appellant's counsel responded, "No, your Honor" (409). He then made the following offer of proof (409):

¹² With respect to appellant's assertion that the informant's testimony might have provided crucial information on the informant's relationship with the government (an assertion which is belied by appellant's decision not to call him), we note that this relationship could have been explored in the testimony of the government agents. And indeed evidence was in fact adduced showing that Agent Wilson had previously dealt with the informant (164-166). Moreover, the testimony of the government's witnesses even lends support to the notion that the informant was acting on behalf of the government with regard to the December 16th transaction.

The witness will simply testify to the fact that calls were received from an individual named Jimmy and these calls were repeatedly made on the witness' phone.

The government then argued that the testimony was being introduced to prove that the person who made the phone calls to the witness was "Jimmy", the informant, and that, without proper foundation for such testimony, it would be inadmissible as hearsay. The government argued further that the necessary foundation would be some "voice identification" testimony (409). Appellant asserted that the testimony was not being offered to show that the caller was, in fact, Jimmy, but rather merely to show that calls were received from someone purporting to be Jimmy, thereby circumstantially supporting appellant's testimony (410). On the basis of these facts, the district court excluded the evidence (410-411).

The court correctly ruled that the testimony was hearsay and therefore inadmissible. The informant's role was the central issue at the trial, and the testimony in question was being offered to prove that that informant, and not just any person named Jimmy, had called someone else and asked for appellant. As such, it was being offered to prove "the truth of the matter asserted." Rule 801(c), Fed. R. Evid. It cannot be argued that these statements were admissible under the "state of mind" exception to the hearsay rule. Rule 803(1), Fed. R. Evid. The hearsay statements which related to appellant's state of mind were those made to him by Laura Tomkins, about which appellant had already been permitted to testify (307).

Additionally, the declarant of those statements, the informant Jimmy, was available to testify. As discussed above, the informant was available and in court on the day that appellant offered this testimony. Appellant could have called him to the witness stand and, if necessary, had him declared a hostile witness and cross-examined

him for the purpose of establishing that he made the phone calls in question. In short, the district court properly applied the hearsay rule here.

Finally, the error—if any—was harmless. As previously indicated, appellant's testimony regarding entrapment (including the calls received from Jimmy) was uncontradicted. Therefore, as with the testimony of the informant, the proffered testimony of Laura Tomkins would have been merely cumulative. Indeed, defense counsel admitted that "there [was] an excellent possibility that this [was] going to be deemed cumulative testimony" (384). The district court's refusal to admit such testimony was therefore within its discretion and, in any event, not seriously prejudicial.

D. Appellant Was Not Unduly Restricted In His Cross-Examination Of Government Agents.

Appellant also contends (Br. 19), without substantial elaboration, that "any attempt to explore the government's relationship with the informant . . . through cross-examination of the Government's own witnesses was summarily cut off." The record reveals, however, that cross-examination of the government agents on that issue was full and not unduly restricted.¹³ In addition, the three questions which appellant cites,¹⁴ to which objections were properly sustained on the basis of materiality (162), were in fact all eventually answered by Agent Wilson. Thus, Wilson testified that he knew the informant (165); that he had seen him before (165-166); and that he had had a previous relationship with the informant, but not in connection with a "check buy" (166).¹⁵

¹³ See cross-examination of Inspector Cole (127); Agent Wilson (161-166, 170-171); Agent Nicoletti (263-264, 268).

¹⁴ See Br. p. 5, at fn. ("Had you been familiar with this source before?"; "Had you had occasion to see this man before?"; "Had you had occasion to work for this man before?").

¹⁵ Wilson also testified that he had been involved in only one other "check buy" (162).

With respect to the question of the informant's relationship to government agents, the other restrictions on cross-examination related primarily to the informant's name and address (see discussion *supra*, pp. 14-15) and to the relationship of the informant and the agents subsequent to the crime—an inquiry which had little or no bearing on the entrapment defense. In sum, appellant was not deprived of a fair trial by the court's limitations on defense counsel's cross-examination.

Nor is there any merit to appellant's contention (Br. 25-26) that the various errors he alleges, even if individually insignificant, somehow have a "combined weight" which is substantial.

POINT II

The Evidence Proved And The District Court Properly Instructed The Jury On The Crime Of "Uttering".

Appellant claims (Br. 27-28) that as a matter of law he could not be found guilty of the crime of "uttering" forged checks since he made no representation at the time of the sale of the forged checks that they were genuine, an essential element of the offense. *United States v. Brown*, 495 F.2d 593, 597 n.4 (1st Cir. 1974), *cert. denied*, 419 U.S. 965 (1974). He further contends that the circumstances surrounding the sale on December 16th were entirely inconsistent with an implicit representation of genuineness.

We agree with appellant's version of these facts. It is settled, however, that a:

defendant may not be permitted to escape liability by alleging that he merely conspired to transfer checks, and not to utter them, when it was apparent to him that the ultimate and necessary

consequences of the scheme was to utter the checks, and when the defendant . . . made a substantial effort to further that end.

United States v. Brown, *supra*, 495 F.2d at 599.

Appellant's claim here is substantially the same as the one made and rejected in *United States v. Brown*, *supra*.¹⁶ Appellant contends that he can avoid liability for uttering because he was not the person who was making the representation of genuineness. Taking into consideration all the circumstances surrounding the sale of the checks, particularly that appellant assumed that the undercover agent was a "check fence" and that the negotiations were based on a percentage of the "face value" of the checks, the evidence was sufficient to show that appellant believed that eventually those checks would be put into circulation. Under those circumstances, appellant is as guilty as if he had placed the checks in circulation himself. See *United States v. Chamley*, 376 F.2d 57 (7th Cir. 1967), *cert. denied*, 389 U.S. 898 (1967); *United States v. Tramaglino*, 197 F.2d 928 (2d Cir. 1952), *cert. denied*, 344 U.S. 864 (1956).

Thus, the District Court's charge on the crime of uttering, to which appellant did not object, was entirely proper (539-540):

If you should find beyond a reasonable doubt that the defendant was aware he was passing the checks to someone who knew they were stolen or forged and was acquiring them for the purpose

¹⁶ Appellant was charged not only with violating § 495, but also with "aiding and abetting" such a violation under Title 18, United States Code, Section 2. That section, which is analogous to the conspiracy charge in *United States v. Brown*, provides in part that:

(b) Whoever willfully causes an act to be done which if directly performed by him . . . would be an offense against the United States, is punishable as a principal.

of himself placing them in circulation, that would satisfy the first element [of the charge of uttering] as to the defendant on trial.

Accordingly, the Court's instruction represented a proper statement of the applicable law and there was sufficient evidence for the jury to convict the appellant for the crime of uttering under Title 18, United States Code, Section 495.¹⁷

POINT III

Appellant Was Not Deprived Of A Fair Trial By The Prosecutor's Allegedly Inflammatory Examination Of Witnesses.

Appellant finally contends (Br. 29-30) that he suffered irreparable prejudice at trial because the prosecutor elicited responses from government witnesses, all intended payees of the stolen checks, concerning the reasons for their receiving the checks—reasons which, in several instances, related to illness or disability. Appellant argues that the prejudice was aggravated by the prosecutor's remarks in summation. These contentions have no substance.

Seven of the payees of the checks which were the subject matter of the indictment testified, primarily for the purposes of establishing that they never received the checks and (in those instances in which the checks were endorsed) that they had not endorsed nor authorized any-

¹⁷ We also note that the district court imposed concurrent equal sentences of imprisonment on all counts, whether involving "uttering" or possession. Appellant's attack against the "uttering" counts would thus seem to be mooted by the concurrent sentence doctrine.

one else to endorse the checks (70-97).¹⁸ The first three witnesses testified without objection from appellant's counsel. Mary Carter, the first witness, testified that she received Supplemental Security Income (SSI) checks and that she was a disabled widow with arthritis and high blood pressure (72-73); Genevieve Robinson testified that she also received SSI checks because she was unable to work due to a heart condition (75); Frederick Willerford testified that he received disability compensation as a result of his service in the United States Air Force (80).

After Mr. Willerford completed his testimony, defense counsel moved to preclude the government from asking future witnesses about their various disabilities and cited the testimony of Carter and Robinson as examples. The Court granted the motion (82-84). At no time, however, did defense counsel move to strike the testimony already given or request a limiting instruction regarding such testimony. The next payee-witness, Florence Corcoran, was asked by the prosecutor, not about her disabilities, only if she received checks from the Social Security Administration (86). Herve Joseph, the next witness, when asked for what purpose he received the check, answered, "I have had a nervous breakdown" (89-90). The Court later said that it felt the witness had "sort of blurted that out" (98). After Joseph's testimony, defense counsel, who had not objected during the questioning, requested that the government attorney refrain from eliciting the purpose for the checks (91). As before, he requested neither that the testimony be stricken nor that a limiting instruction be given.

The testimony of the next witness, Maria Pagan, indicated only that she received SSI checks (92-94). Cecelia

¹⁸ Stipulations were entered into regarding the testimony of the payees of the other checks (101-102).

Martinez, the final payee-witness who testified, was asked if SSI payments were one of her primary means of support (95). Defense counsel immediately objected and later moved for a mistrial, citing the reference by Joseph to "nervous breakdown" and the unanswered question regarding "primary means of support" as the prejudicial testimony requiring a mistrial (96, 98). It is clear from the record that the court, without an explicit ruling, denied the motion (98-99). Again, defense counsel made no motion to strike or request for a limiting instruction.

During his lengthy summation the prosecutor made, at most, an oblique reference to the above testimony by asking the rhetorical question, "But are there victims to the crime?" (463). The court overruled appellant's objection to the comment (464), which the prosecutor explained was merely intended to emphasize that stealing government checks was not a victimless crime (463-464). The prosecutor's other reference consisted of a comment on the testimony of Mary Carter, the first witness. The prosecutor remarked (465): "[T]he ordinary social security wasn't too much. It wasn't enough to let her meet her living expenses. She testified that she was a disabled widow, had arthritits, etc." No objection was made by defense counsel to this comment, nor was the comment ever stricken from the record.

These two passing comments, in the context of a forty-eight page summation, cannot reasonably be said to have been "designed to appeal improperly to the jurors' passions" (Br., p. 30). Moreover, the force of appellant's contention that the effect of these various questions and remarks was dangerously inflammatory is rather diminished by his own reference in summation (when cautioning the jury about the irrelevance of "sympathy") to a nervous breakdown, arthritis and high blood pressure (523). Finally, it is highly unlikely that these alleged improprieties affected the jury's verdict in

a case such as this, where the evidence of guilt was overwhelming, the only defense was entrapment, and there was little if any significant evidence in dispute.¹⁹ Under these circumstances, the prosecutor's conduct of the trial in these respects is by no means a ground for reversal.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

HARVEY M. STONE,
MARK A. SUMMERS,
*Assistant United States Attorneys,
(Of Counsel).*

¹⁹ We also note that the payees testified on April 26, 1976, and the trial did not conclude until May 4, eight days later.

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Michael Deas

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United States Attorney for

tern District of New York, attorney for the Appellee

on the 12th day of October 1977, he did serve a true copy of
eto annexed Brief for the Appellee

office of Jonathan Silbermar. Esq. Legal Aid Society

y for the Appellant herein, located at 509 US Courthouse
y Square, New York

n of Manhattan, City of New York, by leaving a true copy of the same with
on in charge of said office, there being no one present who was authorized to give an admis-
service.

Michael A. Deas

o before me this

h day of October 1977

Barbara P. Allen

BARBARA A. ALLEN
ry Public, State of New York
No. 24-4646824
Qualified in Kings County
Mission Expires March 30, 1979

Sir:

You will please take notice that a
of which the within is copy, was this day
duly entered in the within entitled action,
in the office of the Clerk of this Court.

Dated, Brooklyn, New York 19.....

Yours, etc.,

United States Attorney,

Attorney for

To

Attorney for

Sir:

Please take notice that the within
will be presented for settlement and signa-
ture to the Honorable
at the office of the clerk,

Borough of City of
New York, on the day of,
19, at o'clock in the noon,
or as soon thereafter as counsel can be
heard.

Dated, Brooklyn, New York 19.....

Yours, etc.,

United States Attorney,

Attorney for

To

Attorney for

Court Index No.

United States Attorney,
Attorney for

Due service of a copy of the within is
hereby admitted.

New York,, 19.....

Attorney for

To

Attorney for

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